86-372

No.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, CHARLIE GREENE, and U.S. FIDELITY & GUARANTY CORP.,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 84-7455, 84-7774

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs-Appellees,
Cross-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellants,
Cross-Appellees,

UNITED STATES FIDELITY & GUARANTY CORP.,
Defendant-Cross-Appellee.

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs-Appellees,
Cross-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellants,
Cross-Appellees,

U.S. FIDELITY & GUARANTY CORP.,
Defendant,

UNITED STEELWORKERS OF AMERICA,
Defendant-Appellant,
Cross-Appellee.

April 8, 1986

Appeals from the United States District Court
for the Middle District of Alabama

Before HILL and CLARK, Circuit Judges, and MOYE *, Chief District Judge.

CLARK, Circuit Judge:

All parties below have appealed from the district court decision in this suit for an accounting of union funds under § 501 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501(a), (b). Elbert Erkins and Samuel Denson, plaintiffs below, were members of Local 7326 (Local), United Steelworkers of America (USW), when the Local struck plaintiffs' employer, American Building Co. in Eufaula, Alabama. The strike lasted from December, 1976 until May, 1978, when employees voted to decertify USW as their bargaining representative. During the course of the strike, USW provided the Local with a strike fund of $405,000. Billy Bryan, Arthur Comer, George Bullard and Charlie Greene, defendants below, were either Local officials or prominently involved in directing picketing and other strike efforts. Together, these four individuals received $140,000 from the strike fund in payment for various expenses incurred on behalf of the Local.

Soon after the strike ended, plaintiffs challenged the propriety of these payments, especially in view of the fact that defendants had acquired significant items of personal property during and after the strike while many other union members were struggling just to meet household expenses. Plaintiffs investigated the use of strike funds by defendants and in January, 1980, they requested that USW bring suit against defendants for misapplication of union funds. When USW instead referred the case

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* Honorable Charles A. Moye, Jr., Chief U.S. District Judge for the Northern District of Georgia, sitting by designation.

to the Department of Labor, plaintiffs sought leave to bring suit on behalf of the union in federal court. Leave was granted and suit was filed on May 1, 1980, two years after the end of the strike.

In their suit, plaintiffs sought recovery of the $140,000 in payments, either from the individual defendants or from their indemnitor, United States Fidelity and Guaranty Corporation (USF & G). In addition, plaintiffs requested an award of $305,000 in attorney's fees, payable by the defendants or intervenor, USW. After a three day non-jury trial, the district court ordered a recovery of $14,461.30 from the individual defendants, payable to USW. The court held that plaintiffs' delay in joining USF & G had discharged the indemnitor from any liability under the bond, and recovery could be had only from the individuals. In a separate order, the court awarded plaintiffs $42,000 in attorney's fees, payable by USW. 598 F. Supp. 240.

The parties present the following issues on appeal. Defendants argue that the strict court erred in finding plaintiffs had standing to sue as union "members" under § 501(b) of LMRDA. Defendants contend that the statutory definition of union "member" must yield to each union's definition of membership and plaintiffs would not be considered members by USW standards. Alternatively, defendants urge that this suit is time barred under recent Supreme Court precedent applying a six-month statute of limitations to cases brought under federal labor law. Intervenor USW joins in defendants' arguments and furthermore contests the order to pay $42,000 in attorney's fees. USW contends that the district court's use of the common benefit theory of fee awards is clearly at odds with the language and legislative history of § 501(b), which limits fee awards to the amount of money recovered in an accounting suit (here only $14,461.30).

Plaintiffs for their part assert error in the district court's order to recover only $14,461.30. Plaintiffs con-

tend that the district court arbitrarily approved numerous payments not properly accounted for by defendants; thus, they request a judgment for the full $140,000 paid to defendants. Furthermore, plaintiffs contend that USF & G was erroneously found discharged from the fidelity bond since USF & G did not prove prejudice from the delay in being joined as a defendant. Lastly, plaintiffs' attorneys argue that the district court erroneously awarded only 12% of their requested fee by arbitrarily reducing the number of hours billed, the hourly rate and eliminating the contingency factor.

We affirm the district court order and thus, reject all these contentions.

I. *Plaintiffs' Standing Under § 501*

Section 501(a) provides that "the officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is therefore, the duty of each such person . . . to hold [the organization's] money and property solely for the benefit of the organization and its members." 29 U.S.C. § 501(a). Section 501(b) provides that "any member of the labor organization" may sue a defaulting union officer in federal court "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). Defendants argue that plaintiffs were not members of USW at the time of suit and therefore cannot sue for an accounting. Our consideration of this issue is foreclosed by the decision of a prior panel in an interlocutory appeal in this case. *See Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981) (*Erkins I*). That panel held that plaintiffs were USW members at the time of filing suit and thus had standing to sue. Since findings of fact and conclusions of law by an appellate court bind all subsequent proceedings on the same case, absent exceptional circumstances, we find that plaintiffs

have standing. *See Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984).

II. *Statute of Limitations for § 501 Accounting*

Defendants assert that the district court erred in refusing to apply the six-month statute of limitations of the National Labor Relations Act (NLRA) to the present action. Neither § 501 nor the LMRDA specifically provide a period of limitations. When confronted with such legislative omissions, federal courts ordinarily adopt the most analogous state statute of limitations. An exception to this rule occurs when state law would contradict the purposes of the federal law or policy at issue; in that case, courts look to related federal statutes or doctrines. *See UAW v. Hoosier Corp.*, 383 U.S. 696, 703-704, 86 S.Ct. 1107, 1111-1112, 16 L.Ed.2d 192 (1966). Defendants urge that the recent Supreme Court decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 5, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), requires this court to apply the NLRA statute of limitations in this case.

DelCostello involved a hybrid action brought under federal labor law by a disgruntled union member against his employer for breach of the collective bargaining agreement and against the union for breach of its duty of fair representation. The suit against the employer was brought under § 301 of the National Labor Relations Act, 29 U.S.C. § 185. The suit against the union was brought as an unfair representation claim pursuant to 29 U.S.C. § 158(b). The Supreme Court selected a federal rather than state limitation for the case based upon several considerations: the Court found no closely analogous state limitations; federal labor policy in this context required particularly prompt resolution; and the interplay of hybrid claims, one part (the unfair labor practice claim) having an extremely short express federal limitation (6 months under § 10, 29 U.S.C. § 160(b)), argued

for a single federal limitation when combined. *See* 462 U.S. at 171, 103 S.Ct. at 2294. Thus, the Court applied the six-month limitation normally applicable to unfair labor practices, *see* 29 U.S.C. § 160(b), and emphasized that such a result properly balances "the national interest in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system." 462 U.S. at 171, 103 S.Ct. at 2294 (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981)). The Supreme Court noted, however, that nothing in the *DelCostello* analysis should upset the traditional rule of *UAW v. Hoosier, supra*. *See* 462 U.S. at 171, 103 S.Ct. at 2294.

In this circuit, the rationale of *DelCostello* has been applied in two contexts other than a hybrid action, and defendants argue that these cases should control our decision here. The first such case is *Erkins v. United Steelworkers*, 723 F.2d 837 (11th Cir. 1984) (*Erkins II*), a pure breach of fair representation claim brought by the instant plaintiffs and based on the failure of the union to negotiate with the employer during the strike which spawned the present case. The *Erkins II* panel applied the NLRA limitation for unfair labor practices because a fair representation claim bears a close resemblance to an unfair practice and thus implicates the very balance of interests at issue in *DelCostello*. *See* 723 F.2d at 838-39.

Following *Erkins II*, another panel relied on *DelCostello* in *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985). *Davis* involved abuse of free speech rights protected by 29 U.S.C. § 411(a)(2), part of the "Bill of Rights of Members of Labor Organizations." The panel noted that the *DelCostello* analysis did not compel the use of the NLRA limitation because free speech claims do not implicate the collective bargaining structure as do unfair

practices and thus, do not require uniform limitations or expedited resolution. *See* 765 F.2d at 1514. Rather, the panel found that the expulsion of the plaintiffs from the union was based upon friction between the local union and the international union which threatened stable bargaining relationships between the international union and the steel industry. Referring to *DelCostello*, the panel opinion stated: "We believe we are bound to find a similar connection between labor peace and an action based on a union's alleged mistreatment of its members by the denial of statutorily protected rights." *Id.* at 1514. Further, the panel found no analogous state cause of action.

The cause of action under consideration here is quite different from those described and we conclude that the limitation period for filing a § 501 action is not governed by *DelCostello*, *Erkins II*, or *Davis*. Plaintiffs in this lawsuit sought an accounting for union funds allegedly diverted to personal use by the individual defendants. There is no claim against a union or an employer. Consequently, neither the collective bargaining process nor stability of labor union relations is involved.[1]

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[1] We distinguish the rulings of other circuits applying the six-month NLRA limitations on similar grounds. *Local Union 1397 v. United Steelworkers*, 748 F.2d 180, 184 (3d Cir. 1984), concerned alleged violations of LMRDA clearly implicating labor management relations. Local Union officials had been disciplined for disagreement with international union officials about "pollution control in steel plants, collective bargaining strategy, construction of new plants, arbitration policies" as well as "internal union governance." 748 F.2d at 182. In *Vallone v. Local Union 705*, 755 F.2d 520 (7th Cir. 1984), union members likewise brought suit under LMRDA for free speech violations occurring in connection with a dispute about modifications of the labor contract. *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984), involved failure to provide copies of the collective bargaining agreement to union members disputing their discharge from union construction work. The link between labor-management stability and LMRDA is clear in all these cases but not in the instant case.

Since this § 501 suit is not controlled by the rationale of *DelCostello* and its progeny, the district court declined to apply the NLRA limitation. Instead, the district court applied the federal equitable doctrine of laches and still found the suit timely filed. In so doing, the court recognized another exception to *UAW v. Hoosier's* suggested reliance on state statutes of limitations. Policies underlying the creation of federal equitable claims are not well served by applying rigid limitations; therefore, federal courts considering federal equitable claims should rely on equitable principles. *See Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed.2d 743 (1946). Since a § 501 suit for an accounting is essentially equitable in nature, *see Local 92, International Association of Bridge Workers v. Norris*, 383 F.2d 735, 741 (5th Cir. 1967) laches is an appropriate test for timeliness. *Accord Morrissey v. Curran*, 482 F. Supp. 31, 40 (S.D.N.Y. 1979); *Yablonski v. UMW*, 80 L.R.R.M. (BNA) 2594 (D.D.C. 1971). The district court in turn correctly applied the doctrine, finding that plaintiffs' May 1, 1980 filing caused no undue prejudice to defendants and therefore the suit was timely filed. *See EEOC v. Dresser Industries, Inc.*, 668 F.2d 1199 (11th Cir. 1982) (laches requires unequitable delay in filing and undue prejudice to defendants).

III. *Misapplication of Strike Funds*

Plaintiffs on cross-appeal assert that the district court erred in its calculation of misspent funds. They contend that defendants should remit all $140,000 paid them since the expenses or compensation claimed were never supported by records, receipts or independent corroborating testimony. Plaintiffs consider the failure to keep records a *per se* breach of fiduciary duty under § 501.

Such a position ignores Congress' admonition that courts must "take into account the special problems and functions of a labor organization" when construing fidu-

ciary duty under § 501. *See* 29 U.S.C. § 501(a). Imposing liability on the mere failure to keep receipts would ignore the fact that strike leaders are neither accountants nor comptrollers; their positions as union leaders demonstrate their organizational rather than financial expertise. The district court employed a more appropriate legal standard. A union official fulfills his fiduciary duty, even though he may indirectly benefit from use of union funds, whenever he can show that the funds were authorized by the union and were expended for the benefit of the union. *See Ray v. Young*, 753 F.2d 386 (5th Cir. 1985); *Morrissy v. Curran*, 650 F.2d 1267 (2d Cir. 1981).

The district court correctly applied this rule with regard to each category of contested payments. Plaintiffs disputed the fact that defendant strike leaders received far more than the $20 to $30 per week strike benefit paid rank and file members. The lower court found most of these payments authorized and reasonable simply because defendants spent far more time and effort promoting the strike and boycott than other union members.[2] Not only did their efforts benefit the union, they precluded defendants from working elsewhere to meet their household expenses. Conversely, the lower court disallowed a number of third party payments as unauthorized by union rules and manifestly unreasonable since such payments would not have been made to rank and file members and the union received no benefit from the payments.[3]

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[2] For example, defendant Billy Bryan, former president of the Local, worked twelve to sixteen hours per day, five to six days a week on strike maintenance. Charlie Greene acted first as assistant and then principal treasurer for the strike fund, working three to four days each week. These men, as well as the other defendants, also made numerous trips in support of the strike and boycott.

[3] These third party payments included strike fund checks negotiated, for example, to pay for clothing, household goods, and auto repairs on cars not used for union business.

The trial court took a creative, but certainly not inequitable, approach in reviewing the final category of payments, those for travel expenses. These payments cannot be disallowed as a matter of law since there is no showing that defendants' trips were unauthorized. Indeed, defendants must have incurred some expense since plaintiffs failed to show that any of the trips did not take place. Personal benefit occurs only if the pre-trip expense money was not completely spent on the single trip for which it was issued. Any overage would be unauthorized and manifestly unreasonable since defendants would have been overcompensated. *See Ray v. Young, supra* at 392, (double reimbursement for expenses voids authorization and requires reimbursement). The trial court's use of an average time, distance and cost for each challenged trip seems an acceptable means, in the absence of specific records, or determining whether defendants were overcompensated for trip expenses. Approximation is necessary as a matter of equity where plaintiffs have failed to disprove the fact of a trip. The court's function in a § 501 accounting is not to impose, through the penalty of reimbursement, specific record keeping procedures. Courts should intervene in a union's financial affairs only when authorized payments are "significantly above a fair range of reasonableness." *Morrissey v. Curran, supra* at 1275. Thus, we affirm the district court order to return $14,460 to the international union.

IV. *Attorneys' Fees*

A. Setting the Appropriate Fee

Plaintiffs' attorney assert several errors by the district court in its calculation of their fee. First, they claim that unrebutted affidavits regarding hours and hourly rates were improperly ignored. Second, they claim that the court failed to increase basic fees to reflect the contingent aspects of the case, despite case law authorizing such upward adjustment. Third, they suggest that

cutting the already diminished fee by an additional 60% contradicts the lower court's finding of substantial non-monetary benefits produced by this suit. Despite these arguments, we affirm the fee award of $42,000.

Section 501(b) of the LMRDA authorizes the award of reasonable attorney fees and expenses in cases such as this one.[4] The district court has properly considered plaintiffs' attorneys' request for $203,587.50 in fees, plus an enhancement of 50%, for a total of $305,381.25. Plaintiffs claim that 1,749 hours were spent on the case at an average rate of $116.40. Plaintiffs' three attorneys claimed individual hourly rates of $125 (out-of-town counsel) and $80 (local counsel). The district court relying on *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-18 (5th Cir.1974), eliminated about one-third of the hours claimed as unnecessary, duplicative or poorly documented. Next, the court selected $90 as the appropriate hourly fee since plaintiffs' affidavit listed local community rates within a range of $75 to $200. This figure is not clearly erroneous and is consistent with the dictates of *Johnson, supra.* Indeed, the district court merely employed a sense of "billing judgment" customarily used in private practice. *See Hensley, supra* at 1940. Thus, the district court correctly found a starting point fee of $90,000 to $100,000.

Furthermore, the district court clearly did not err in refusing to enhance the starting point or "lodestar" fee. Plaintiff's attorneys cite the following justification for enhancement by 50%: complex legal issues, high risk of loss, substantial time investment with low probability of compensation, important values at stake, and potentially

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[4] 29 U.S.C. § 501(b) provides: "The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

large monetary and non-monetary benefits to USW members. The Supreme Court recently rejected such reasons for enhancement. *See Blum v. Stenson*, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The *Stenson* Court found that novelty and complexity are reflected in the number of hours expended; additional compensation is merely "double counting." 104 S.Ct. at 1549. Further, the benefits resulting from this litigation do not justify an enhancement of the starting point fee. To the contrary, the results support the district court's reduction of the fee.

We find that the district court correctly decreased the fee award from a maximum starting point of $100,000 to only $42,000. The Supreme Court has recognized that the quality of results obtained is an "important factor" in reaching a final fee amount. "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee . . . . If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley, supra* at 1940-41. Plaintiffs certainly did not obtain excellent monetary results here as only 10% of the amount sought was actually obtained. Indeed, the trial court found that at most $50,000 constituted questionable payments. In undertaking any case counsel is obligated to consider the amount involved, the merits of the client's cause, and the chance of success at the outcome of the representation. Here plaintiffs sought recovery of $140,000 in the lawsuit but requested $305,000 in fees at the conclusion of the case. Fees of $300,000 or even $100,000 are inappropriate where only $15,000 is recovered. In *Blum v. Stenson, supra*, the Supreme Court specifically held that enhancement of a fee is permissible where there is exceptional success. As part of the same reasoning, it must be accepted that fees have to be reduced on occasion when the result

was less than a success, as occurred here. The result had to have been foreseeable by counsel and they have to share some of the loss along with plaintiffs, as the converse would be true if exceptional success had been achieved. We refuse to give any credit for the contingency factor, since counsel failed to properly appraise the case at the outset. Also, in considering the level of success, we note that counsel failed to join timely defendant USF & G so that it would have been available as a defendant to contribute to a possible settlement. The district court properly considered *Johnson*, *Hensley*, and *Blum*, and reached an appropriate fee award.

The court's award is, moveover, consistent with prior cases under § 501. *See Local 92, International Association of Bridge Workers v. Norris*, 383 F.2d 735 (5th Cir. 1971); *Highway Truck Drivers v. Cohen*, 220 F.Supp. 735 (E.D.Pa.1963). Plaintiffs' counsel cite no cases in which the spread between fees and recovery are as great as that requested in this case. In fact, the award in this case is more generous than those cited above. Here, plaintiffs' counsel will receive three times the monetary recovery; in *Cohen*, the attorneys received half that much; and in *Norris*, they received less than the award itself. To the extent the fee exceeds the recovery, counsel has been compensated for the non-monetary as well as the monetary benefits produced by their efforts on plaintiffs' behalf.

B. Union's Liability for Fees

USW, the union beneficiary of all funds recovered by plaintiffs in this suit, intervened to limit the fee award. Under the terms of the statute, the union has an opportunity to prosecute plaintiff's claim of misapplied funds. If the union declines and the claim proves meritorious nonetheless, the union may be required to pay the cost of plaintiff's efforts. USW asserts that even if plaintiff's have recovered $14,460 in union funds, the inter-

national union should not be required to pay more than that amount for plaintiff's attorneys' fees. The district court held to the contrary, citing the former Fifth Circuit opinion *Local 92 v. Norris*, 383 F.2d 735 (5th Cir.1967). *Norris* held that an international union could be liable for attorney fees if the misapplied funds had not yet been returned to the union. Additionally, *Norris* held that the fees could exceed the recovery. Under the rule of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), we are bound by the holding of *Norris*.

USW claims that recent Supreme Court rulings on attorney fee awards, principlly *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967), and *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), have rendered *Norris* non-binding precedent in this circuit. *See County of Monroe, Florida v. Davenport of Labor*, 690 F.2d 1359 (11th Cir.1982) (prior panel decision is not binding when contradicted by intervening Supreme Court precedent). Furthermore, USW argues that the holding in *Norris* ignores the plain language and history of the statute, which clearly limits fee awards to the amount of the recovery.

First, we cannot agree that *Fleischmann* and *Aleyska* have undermined *Norris'* precedential value. In both cases the Supreme Court declined to authorize an award of attorney fees when the federal statute which was the basis of the lawsuit did not authorize such an award. *Fleischmann* holds that where Congress has set out a detailed scheme of remedies for a statutory cause of action, courts may not expand those remedies on the basis of general equitable principles. *See* 87 S.Ct. at 1408-09. The remedies provided under § 501 of the LMRDA do not approach the specificity of those considered in *Fleischmann*, an action for trademark infringement under the Lanham Act. The latter statute provides for injunction and recovery of damages, defendant's profits, and costs including fees for clerks, marshals, court reporters, wit-

nesses, printing, copying and docket fees. *See* 28 U.S.C. § 1920. Notably omitted is any reference to attorney fees. Section 501(b) provides that plaintiffs may sue for an accounting, damages or "other appropriate relief" and provides for an award of attorney fees. While this language is more specific than that of other sections of the LMRDA, *see, e.g.*, 29 U.S.C. § 412 (suit for "such relief (including injunctions) as may be appropriate"), it hardly sets forth the comprehensive remedies found in the Lanham Act. Furthermore, there is no evidence that Congress meant to prohibit equitable remedies under § 501. On the contrary, Congress' reference to an accounting seems an affirmative invitation to rely upon equity in enforcing fiduciary duties. *See Norris*, 383 F.2d at 743. Thus, *Fleischmann* is not authority for our overruling *Norris* and holding that an attorney's fee may not exceed the amount of the recovery.

USW's reliance on *Alyeska* is similarly unpersuasive. In that case the Supreme Court held that courts may not shift attorney's fees simply to encourage private enforcement of legislation in the public interest. *See id.* 95 S.Ct. at 1627. If Congress has not provided expressly for fee-shifting, courts may not fill the gap by rewarding successful plaintiffs for acting as "private attorneys general."

While *Alyeska* may spell the end of fee-shifting in the absence of statutory authorization, it does not control the present case. First, and most obviously, § 501 of the LMRDA expressly authorizes fee-shifting. Second, the Supreme Court's analysis in *Alyeska* focused on the private attorney general concept. *See* 421 U.S. at 260, 95 S.Ct. at 1623. It could not deal with the common benefit theory, the principle at issue in this case, because under the facts of *Alyeska*, fees could not be shifted to the direct beneficiaries of the suit.[5] Thus, the holding of

[5] The plaintiffs in *Alyeska*, several environmental groups, had sought to prevent construction of the trans-Alaska pipeline by

Alyeska in no way impairs the holding of *Norris*. Indeed, fee-shifting in excess of the recovery under § 501 has survived *Aleyska* intact. The District of Columbia Circuit, for example, has implicitly reaffirmed such fee-shifting in post-*Alyeska* cases. *See, e.g., Usery v. Local 639, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C.Cir.1976) (noting that *Aleyska* did not impair the common benefit theory used in LMRDA cases); *Monzillo v. Biller*, 735 F.2d 1456 (D.C.Cir.1984).

While we affirm that *Norris* remains good law, we also point out that its allowance of fees in excess of judgment is fully consistent with the legislative purpose of § 501. As the Supreme Court has noted, the LMRDA reflects "calculated ambiguity [and] political compromise" rather than a precise congressional directive. *See Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 1949 n.17, 36 L.Ed.2d 702 (1973) (quoting Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich.L. Rev. 819, 852 (1960)). The better guide to statutory construction here is Congress's ultimate purpose in legislating, not its "plain language."[6] *See id.* The

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bringing suit against the Secretary of the Interior. The groups sought an injunction against issuance of permits facilitating the acquisition of land for the pipeline. *See* 421 U.S. at 242-45, 95 S.Ct. at 1614-15. At the close of litigation, the District of Columbia Circuit directed the pipeline company to reimburse one-half of the plaintiffs' attorneys' fees. *See id.* at 1616. Consequently, the cost of litigation would have been borne by the pipeline's customers but the benefits of enforcing the environmental laws at issue would have redounded to the general public.

[6] This response to the "plain language" argument applies equally well to USW's argument on legislative history. USW relies on the fact that from the Senate floor, prior to passage, Senator Goldwater criticized the legislation on this very point. He noted that the language of section 501 differed from that in other parts of the bill, the latter specifically authorizing fees in addition to, rather than as a portion of, the monetary recovery. *See* 105 Cong. Rec. 16489 (daily ed. Aug. 20, 1959) (statement of Sen. Goldwater). Senator Goldwater warned that this difference would inhibit mem-

LMRDA's purpose is to impose fiduciary duties on union leaders and to remove disincentives to enforcement of those duties by union members. *See Bakery Workers v. Ratner*, 335 F.2d 691, 696 (D.C.Cir.1964). Strictly limiting fees to the amount recovered would frustrate that purpose. *See id.*

Nowhere is this realization clearer than in the courts' routine allowance of fees in suits for injunction or other non-monetary relief under LMRDA. *See, e.g., Monzillo v. Biller*, 735 F.2d 1456 (D.C.Cir.1984) (suit for injunction); *Marshall v. United Steelworkers*, 666 F.2d 845 (3d Cir.1981) (suit to overturn election results); *Usery v. Local 630, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C.Cir.1976) (intervention in suit to overturn election results). Such fee-shifting is based on the common benefit theory, the equitable principle which requires that those who directly benefit by litigation must reimburse the successful plaintiff's costs or stand unjustly enriched. *See Usery, supra* at 382 (citing *Sprague v. Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed.2d 1184 (1939)).

Since neither Supreme Court precedent nor congressional intent limit the scope of § 501(b), we reject USW's contention that fee-shifting in excess of the recovery is always impermissible. Rather, we find such relief necessary to effect the equitable goals of § 501. Nonetheless, fees above the recovery are not automati-

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ber enforcement since the cost of litigation could exceed the fund recovered. USW concluded that since neither house amended the bill to conform section 501 with other sections, Congress intended to strictly limit fees to the amount of the recovery. While USW's research is sound, its conclusion is faulty. It is true that Congress generally acts for a reason, and often for reasons set forth in the legislative history, but we can never be sure, in the absence of an explicit statement, why Congress fails to act. Any conclusions about legislative intent drawn from the sequence of events merits the same skepticism due the plain language of the statute.

cally shifted simply because they represent a reasonable amount under the *Hensley-Stenson* factors discussed at part IV A, *supra*. To shift the excess, the plaintiff must prove that litigation confers significant non-monetary benefits on those persons who will ultimately pay the fees. *See Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973). Furthermore, those fees must spread the cost proportionally among those who benefit. *See Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226, 1235 (6th Cir.1984) (quoting *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970)).

Proportionality of cost and benefit is obvious here, since the strike funds were actually provided by USW and USW would both recover them and pay the fees under the district court order. As the District of Columbia Circuit has noted, payment of fees by the union under LMRDA is a quintessential example of proportionality: there is "a close match between the party assessed and the beneficiary of the litigation." *See Usery, supra* at 383. Thus, we reject USW's claim that only the defunct Local will benefit from this suit. In reality, neither the Local nor the plaintiffs will realize a penny.

Substantial non-monetary benefits from the suit are less obvious, but not clearly erroneous. The district court found two. First, the suit exposed the practical flaws in USW's strike fund accounting procedures. Second, plaintiffs' ultimate recovery demonstrates that USW cannot rely on Department of Labor investigations to find fiduciary breaches in Local affairs. USW considers these benefits insubstantial because it plans no change in accounting procedures nor has the court ordered any. Thus, the so-called "benefit" would only "result [from] the realization that the union would have to reform itself or risk exposure to further liability." *Shimman v. Local 18, International Union of Operating Engineers*, 744 F.2d 1226, 1235 n.13 (6th Cir. 1984). USW suggests that we

follow the Sixth Circuit, which has refused to shift fees in just this sort of case because the benefit, in its opinion, is no different from results achieved under the private attorney general theory.

We decline to apply *Shimman* to this case. *Shimman's* primary benefit, in the sum of $225,000, ran solely to the named plaintiff, compensating him for assault and battery and violation of his free speech rights. Any incentive for change in union policy was largely ancillary to plaintiff's personal recovery. Here, in contrast, the monetary recovery, as well as the incentive to change, directly concerns USW rather than the plaintiffs. Furthermore, we do not find such incentive an insubstantial benefit. Substantiality does not rest on compulsory reform or injunctive relief. The District of Columbia Circuit has found substantial benefits as the result of preliminary injunctions and the mere filing of suit for such an injunction. *See Yablonski v. UMW*, 466 F.2d 424 (D.C. Cir. 1972). Compulsion was not possible in *Yablonski* since the merits were never reached, yet, the court found a benefit and shifted fees. Similarly, that circuit and the Third Circuit have found benefits sufficient to shift fees where the plaintiff has only intervened in a suit brought by the Secretary of Labor. *See Marshall v. United Steelworkers*, 666 F.2d 845 (3d Cir. 1981); *Usery v. Local 639, International Brotherhood of Teamsters*, 543 F.2d 369 (D.C. Cir. 1976). The benefits were said to be the intervenor's unique perspective on the case and the possibility he might discover new evidence or develop legal arguments for the Secretary's litigation. *See Marshall*, 666 F.2d at 853; *Usery*, 543 F.2d at 383-84. Certainly, if the intervenor's contributions constitute a benefit sufficient to shift fees, plaintiffs' impeachment of USW's strike fund accounting provides a substantial benefit to the members of USW. Thus, we affirm the district court order that USW pay $42,000 for plaintiffs' attorneys' fees.

V. *Liability Under the Fiduciary Bond*

The final issue on appeal concerns the extent of recovery under USW's fiduciary bond for the defendants. Section 502 of LMRDA requires that "every officer, agent . . . or other representative or employee of any labor organization . . . who handles funds or other property thereof shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty." 29 U.S.C. § 502(a). USF & G, defendant below, had bonded the defendant officials of the Local. Although USF & G was not originally a party to this suit, plaintiffs learned of the USF & G bond about one month after the suit was filed. The bonding company was not joined as a defendant, however, until three years after filing. After a trial on the merits, the district court found that plaintiffs could not recover from USF & G because they had failed to meet the notice and claim provisions of the bonding contract.

Plaintiffs claim error in the district court's finding. They contend that rank and file union members cannot be barred from recovery for failure to comply with notice and claim provisions. *See Giordani v. Hoffman*, 295 F. Supp. 463 (E.D. Pa. 1969); *Purcell v. Keane*, 277 F. Supp. 252 (E.D. Pa. 1967). Although *Giordani* and *Purcell* allowed claims in spite of failure to comply with the bond provisions, those cases are not controlling here. Since the bonding companies had been jointed in the original complaints in those cases, prejudicial delay was not at issue. Here, plaintiffs delayed for three years after they received actual knowledge of the bond's existence; during that time, they never inquired as to the bond's provisions. Plaintiffs claim they were distracted by the hotly contested issue of standing to sue. While distraction certainly is possible, it is no excuse for failure to diligently pursue all claims arising from the misapplication of strike funds. *See United Klans v. McGovern*, 621 F.2d 152 (5th Cir. 1980) (once plaintiff has inquiry notice

of claims, statute of limitation begins to run). Contrary to plaintiffs' assertions, prejudice to USF & G from this delay in joinder is certainly not speculative. USF & G was denied the opportunity to challenge plaintiffs' standing under § 501, to argue for or against intervention by USW, and to participate in much of the discovery prior to trial. We conclude, therefore, that plaintiffs' claim against USF & G is barred for lack of due diligence. We affirm the district court's finding.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Caption Omitted in Printing]

Before HILL and CLARK, Circuit Judges, and MOYE*, Chief District Judge.

JUDGMENT

These causes came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgments of the said District Court in these causes be and the same are hereby, AFFIRMED;

It is further ordered that each party bear their own costs on appeal.

Entered: April 8, 1986

For the Court: Spencer D. Mercer, Clerk

By: Deputy Clerk

ISSUED AS MANDATE:

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* Honorable Charles A. Moye, Jr., Chief U.S. District Judge for the Northern District of Georgia, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
M.D. ALABAMA, N.D.

Civ. A. No. 80-180-N

ELBERT ERKINS and SAMUEL DENSON,
Plaintiffs,

v.

BILLY BRYAN, and ARTHUR COMER, and
GEORGE BULLARD, and CHARLIE GREENE

Nov. 27, 1984

William I. Grubb, II, Eufaula, Ala., Thomas M. Jacobson, Milwaukee, Wis., Walter Kelly, Milwaukee, Wis., for plaintiffs.

Jerome A. Cooper, Birmingham, Ala., for defendants.

MEMORANDUM OPINION

HOBBS, District Judge.

This action was commenced under Section 501(b) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501 (1975), by two members of Local 7326, United Steelworkers of America, against defendants Billy Bryan, George Bullard, Arthur Comer, and Charlie Greene. Plaintiffs alleged that said defend-

ants breached their fiduciary duties owed to Local 7326 by misappropriating strike funds for their own personal benefit in violation of 29 U.S.C. § 501(a). After conducting a three day trial without a jury, the Court concluded that the union was entitled to reimbursement from the defendants in the amount of $14,461.30, plus costs and interest.

This cause is now before the Court on the motion of plaintiffs for an award of attorneys' fees. Plaintiffs' attorneys contend that they are entitled to $305,381.25 as compensation for the services rendered to their clients in this law suit. Under LMRDA, 29 U.S.C. § 501(b), plaintiffs seek to recover these fees jointly and severally from defendants and from the United Steelworkers of America. The Court has reviewed plaintiffs' motion, accompanied by the time sheets of plaintiffs' attorneys and supporting affidavits, in light of the twelve factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and in light of *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.C.t 1933, 76 L.Ed.2d 40 (1983). Consideration of these decisions, together with the facts of the instant case, leads the Court to conclude that plaintiff's are entitled to $42,000.00 in attorneys' fees.

I. *Factual Background*

Elbert Erkins and Samuel Denson, plaintiffs in the above-styled action, were rank and file members of the United Steelworkers of America (International) and of its affiliate, Local 7326. Defendants Billy Bryan, George Bullard, Arthur Comer, and Charlie Green were also members of the International and Local 7326. During the relevant times herein, each defendant occupied at one time or another a position of fiduciary responsibility in Local 7326.

From December 1976 through May 1978, approximately three hundred members of Local 7326 engaged in a strike against their employer, the American Buildings

Company of Eufaula, Alabama. This strike commenced at the expiration of the employment agreement between Local 7326 and the company. It was prompted by the company's demand for new terms in the collective bargaining agreement.

During the eighteen month strike, the International sent a total of $450,000 to the union local, along with instructions that the money be deposited into a special checking account which would contain only strike and defense funds. In order to qualify for benefits from this fund, a striker was required to perform for the union, which usually meant walking a shift at the picket line. In return he would receive a weekly benefit of twenty (later thirty) dollars. A striker could also petition the strike committee to obtain money from the fund to pay bills or other obligations. To obtain this addiitonal assistance, the striker would have to demonstrate an urgent need. The members of the union were instructed at the outset of the strike to exhaust their own financial resources and seek alternative sources of income (e.g., unemployment compensation) before petitioning the committee for assistance. During the course of the strike, literally hundreds of union members' bills were paid from the strike funds.

Despite vigorous efforts by the union, the strike was lost when the employees voted not to be represented by the union at a decertification election. The results of this election became final when the union's objections to the decertification election were rejected by the National Labor Relations Board.

After losing the decertification election, Local 7326 was no longer authorized to represent the employees at the company's Eufaula plant. Since Local 7326 did not serve as the bargaining representative for employees of any other employer, a representative of the International was appointed as administrator to conclude the affairs of Lo-

cal 7326. Following his appointment, Local 7326 ceased to exist for all practical purposes. Funds which were not expended during the strike or during the period when the local's affairs were being concluded by the administrator were eventually returned to the International.

Shortly after the conclusion of the strike, plaintiffs and other union members met with the administrator to discuss whether any of the defendants had misappropriated strike funds. Following this meeting plaintiffs remained suspicious that strike funds had been wrongly appropriated by defendants. They decided to conduct their own investigation. They traveled to Milwaukee, Wisconsin in June 1979 to secure the assistance of Mr. Thomas Jacobson, an attorney. At first plaintiffs were unable to meet the fee demands of Mr. Jacobson. However, they returned in October 1979 with sufficient funds to retain him. After traveling to Eufaula and conducting his own investigation, Mr. Jacobson discovered sufficient information to warrant contacting the International and demanding that the union file suit against the defendants. The International refused and instead forwarded the information provided to it by Mr. Jacobson to the Department of Labor for its consideration.

On May 1, 1980, plaintiffs sought leave from this Court to file suit against defendants under Section 501(b). In their verified proposed complaint, plaintiffs asserted that defendants committed numerous violations of their fiduciary obligations as officers or representatives of Local Union 7326. The verified proposed complaint requested an accounting and reimbursement of any misappropriated strike funds. The Court heard testimony from the plaintiffs and determined that the good cause requirement of Section 501(b) had been satisfied. The Court also found that plaintiffs had satisfied the statutory requirement of making a demand upon the International to bring suit against defendants. Because the

International had refused to sue the defendants, this Court allowed plaintiffs to proceed with their complaint.

On June 12, 1980, the International filed a motion to intervene in this lawsuit for the special purpose of seeking to vacate this Court's order allowing plaintiffs to commence this action. The Court allowed the International to intervene for this limited purpose. When at a hearing plaintiffs, through their attorney, conceded that they were not union members at the time suit was filed, this Court held that plaintiffs lacked standing to bring this suit, and, therefore, withdrew its leave to file suit. 494 F. Supp. 732. Plaintiffs appealed, and the Court of Appeals reversed, holding that plaintiffs remained "members" of the union within the meaning of Section 501(b). *Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981), *cert. denied*, 459 U.S. 989, 103 S.Ct. 343, 74 L.Ed.2d 384 (1982).

Plaintiffs also sought to bring a class action alleging that the union breached its duty of fair representation. This Court held such suit was time barred. Plaintiffs appealed to the Court of Appeals, which affirmed this ruling. Plaintiffs also were instrumental in having a federal suit brought against these same defendants for criminal conversion. After a lengthy trial, the defendants were acquitted of the criminal charges by a jury verdict.

After the conclusion of the criminal case, plaintiffs presented evidence in this civil suit over the course of three days regarding the travel expenses, strike benefits, and payments for personal expenses that defendants had received from the strike and defense fund. Out of the $450,000 allotted for the three hundred members of Local 7326, the four defendants received thirty-one percent of the funds, or $140,000.

It is undisputed, however, that the four defendants remained as leaders of the strike for substantially its en-

tire duration of eighteen months. Their duties as leaders of the strike precluded them from obtaining other work, whereas most of the other union members obtained other jobs within a few weeks or months of the beginning of the strike. Moreover, all of the defendants made many trips to other states in aid of the strike, and much of the money which they received from the defense fund was by way of reimbursement for such travel expenses.

The documentation presented by plaintiffs to substantiate charges of abuse and mismanagement by defendants included over two hundred checks that plaintiffs had selected to challenge as having been issued to one or more of the defendants in breach of their fiduciary duty. The Court notes that in order to secure this judgment against defendants, plaintiffs had to overcome difficult legal and factual obstacles that arose during the course of this protracted litigation.

II. *Attorneys' Fees*

A. *Extent of Union Liability*

A threshold question for this Court to consider in arriving at a reasonable figure for attorneys' fees is whether the Court will show plaintiffs' award to exceed their recovery in the case. The question is an important one in a case where plaintiffs claim attorneys' fees of $305,387.25, and their judgment amounted to only $14,461.30.

The statutory provisions governing attorneys' fees in actions brought under the Labor-Management Reporting and Disclosure Act is § 501(b) of the Act. This section provides that a trial judge

> may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b). The International interprets this section to mean that the amount recovered by plaintiffs becomes the fund out of which the Court may allot "a reasonable part" as attorneys' fees, so that the fees can never exceed the recovery. The union argues that the legislative history supports its position. Moreover, the union argues that plaintiffs are seeking to impose on the union the obligation to pay hundreds of thousands of dollars in a law suit where it is not even a party. Its only participation has been by way of limited intervention (1) to oppose the bringing of the law suit for its alleged use and benefits, and (2) to oppose plaintiffs' efforts to collect staggering attorney fees from the union.

Plaintiffs argue that so restrictive an interpretation of the LMRDA provisions does not take the Act's broad purposes into account. LMRDA establishes fiduciary obligations for union officers who occupy positions of trust in a labor organization. 29 U.S.C. § 501(a). When these duties are violated, the Act provides criminal penalties for those who embezzle union funds. § 501(c). It also allows members of the union to file a civil suit for an accounting of union assets. § 501(b). Congress, in enacting LMRDA, remarked that

> A union treasury should not be managed as the private property of union officers, however well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. The members who are the real owners of the money and property of the organiaziton are entitled to a full accounting of all transactions involving their property.

Senate Comm. on Labor and Public Welfare, Labor-Management Reporting and Disclosure Act of 1959, S.Rep. No. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2318, 2324.

Whatever may be the merits of the proper interpretation of the intention of Congress, courts have consistently

rejected the unions' contentions that counsel fees should be limited to the amount of the monetary recovery. *Local No. 92 v. Norris*, 383 F.2d 735, 742 (5th Cir. 1967); *Bakery and Confectionery Workers Int'l v. Ratner*, 335 F.2d 691 (D.C. Cir. 1964); *Highway Truck Drivers & Helpers Local 107 v. Cohen*, 220 F. Supp. 735 (E.D. Pa. 1963). Awards have been based on the theory that the union has benefitted from the results of the litigation initiated by plaintiff. Under this theory, the benefits of the litigation may accrue to unions that were not formal parties in the case, and may exceed the monetary recovery in cases where plaintiffs obtained a favorable, non-monetary benefit for the union. *Id.* In no case, however, has the claim for attorney fees been so disproportionate to plaintiff's potential or actual recovery as in the instant case.

In *Bakery and Confectionery Workers Int'l v. Ratner*, 335 F.2d 691 (D.C. Cir. 1964), for example, the court referred to "the establishment of proper accounting procedures, the calling of a convention for membership expression and control, and the requirement of conformity by the officers with the International constitution" as possible benefits for the Bakery and Confectionery Workers that would merit an award of counsel fees. The monetary recovery, observed the court, may constitute a source for the payment of counsel fees, but the recovery is not the exclusive source for these fees. 335 F.2d at 696-97.

In the present case, the Court is of the opinion that plaintiffs conferred some benefit upon the union which is in excess of their monetary recovery. This lawsuit benefitted the International in two respects. First, it demonstrated to the union that the International's elaborate system for controlling expenditures of its general funds [see Declaration of Thomas Striegel] existed only on paper in regard to Local 7326. Defendants administered over $450,000 of union funds, but did not maintain adequate records of their expenditures, and misappropriated $14,461.30.

Second, the case pointed out the need for union officials to take their fiduciary obligations seriously, and vigorously to investigate charges of wrongdoing by local officials. Before plaintiffs instituted this action, they met with union officials and asked them to investigate plaintiffs' charges that defendants had abused their positions of trust in the local union. The International seemingly refused to investigate, and at all events refused to file suit against defendants, electing to forward the information it had received from plaintiffs to the Department of Labor. There is every reason to believe that if the International had elected to conduct its own internal investigation of the local and to file suit, the same results achieved by plaintiffs could have been attained at much less cost than the cost claimed by plaintiffs. To the extent, however, that the International allows itself to be put in a position where third parties enforce its fiduciary obligations and investigate charges against local officers, judicial decisions binding on this Court require that the International must be prepared to pay for all or a part of this outside help, even if the costs exceed the monetary recovery.

B. *Determination of Fee Award*

Having decided that plaintiff's attorneys are entitled to an award of fees, the Court must now determine the amount that counsel should receive. Plaintiffs have the burden of proving to the Court that they are entitled to an award of attorneys' fees. *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 720 (5th Cir. 1974). They have submitted affidavits and time sheets in support of their claim that they should receive the sum of $305,381.25. Plaintiffs arrive at this figure by multiplying the hours that three of plaintiff's attorneys worked on this matter times the hourly rate for each attorney. This results in a total of $203,587.50. Plaintiffs then increase this figure by a factor of fifty percent, a fee enhancement that plaintiffs claim is appropriate in this case.

In evaluating plaintiff's motion, the Court has paid particular attention to *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *Hensley* teaches that the "most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." 103 S.Ct. at 1939.

The figures that plaintiffs have submitted to the Court on this issue are as follows:

Thomas M. Jacobson (1045.50 hrs at $125)	$130,687.50
Thomas M. Jacobson (travel, 93 hrs at $25)	2,325.00
Walter F. Kelly (483 hrs at $125)	60,375.00
William I. Grubb (127.50 hrs at $80)	10,200.00
TOTAL (without 50% enhancement)	$203,587.50

Plaintiffs have also included itemizations of the time that counsel have spent on this case, along with supporting affidavits from local attorneys regarding plaintiffs' hourly rates. In these affidavits, the attorneys state their belief that plaintiffs' request are reasonable and the local attorneys charge anywhere from $75 to $200 per hour for services similar to those performed by plaintiffs' counsel.

The Court believes that counteraffidavits and discovery could possibly form the basis for challenging whether all of counsel's time was reasonably spent, but this Court is mindful of the Supreme Court's admonition in *Hensley* not to turn the attorney fee petition into a second major trial. Already the time claimed for the fees of plaintiffs' attorneys is many times the amount in controversy. Accordingly, this Court will review plaintiffs' submissions in light of the Court's experience as a member of the local bar for approximately thirty years and as one who

routinely has set fees for lawyers in litigation in this Court for the past several years, taking such aid as the affidavits filed by the parties afford.

The Court is of the opinion that if the only consideration in setting fees in this case is the number of hours reasonably spent by plaintiffs' attorneys times an appropriate hourly rate, plaintiffs would be entitled to an hourly rate of $90 per hour. Fees awarded by this Court have ranged from $40 an hour for beginning attorneys to as much as $100 an hour in a contingent fee case with excellent results for a skillful, prevailing attorney. This Court recognizes that plaintiffs were represented by able, dedicated attorneys.

After reviewing counsel's itemizations, the Court believes that some of the time listed was unnecessary, duplicative or poorly documented. For example, plaintiff had three attorneys present throughout the trial; defendants had one. But defendants are asked to pay for lawyers for their adversaries which clearly they could not have afforded for themselves. This Court recognizes that three attorneys at a trial may be helpful, but this Court has held that such a luxury as even two counsel at a trial should not be paid for by the losing party where defendants were represented by only one attorney—particularly is this true where defendants have very limited resources. *Joyner v. AAA Cooper Transportation Co.*, CA No. 82-884-N (M.D. Ala. Mar. 8, 1984), and see *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717 (5th Cir. 1974). This Court is satisfied that much of the work of the attorneys outside the courtroom was also duplicative even where the attorneys sought to limit the amount of duplicative work.

A careful scrutiny might afford a basis for challenging some of the hours claimed on a basis other than duplicative hours. For example, the record of Mr. Kelly is itemized entirely in one hour increments, and the accom-

panying explanation in some cases does not seem to justify the amount of time claimed. But this Court is satisfied that the attorneys for plaintiffs have spent hundreds of hours productively on this case. If the amount in controversy and the results achieved justified fees based on the simple arithmetic of multiplying hours productively employed, times a reasonable hourly rate for plaintiffs' attorneys, the Court would conclude that the fee should be no less than $95,000 to $100,000. The Court has reduced the amount that plaintiffs may require the union and/or the defendants to pay for plaintiffs' attorneys based on the results obtained and the amount in controversy.

Johnson v. Georgia Highway Express, 488 F.2d at 717, notes the factors that should be considered by the district court in arriving at an appropriate fee.

(1) *Time and labor required:* The Court has concluded that plaintiffs' attorneys spent more time than was reasonably required to prosecute this case successfully, but that plaintiffs' attorneys spent a thousand or more productive hours in representing their clients.

(2) *The novelty and difficulty of the questions:* The case presented a novel question on the issue of standing that was resolved in favor of plaintiffs on appeal. *Erkins v. Bryan*, 663 F.2d 1048 (11th Cir. 1981). In addition, plaintiffs' proof depended on the difficult chore of assembling and reviewing numerous checks in an effort to make sense out of the Local's chaotic financial records. Beyond the complexities of the accounting, the trial itself represented no novel or difficult questions.

(3) *The skill requisite to perform the legal service properly:* Attorneys for plaintiff demonstrated skill and tenacity in persevering in the representation of their clients, despite many obstacles which they had to overcome.

(4) *The preclusion of other employment by the attorney due to acceptance of the case.* Counsel's representation of plaintiffs did not create any conflicts of interest which hindered their ability to represent other clients, nor did it impose upon the time of attorneys involved to an unusual degree.

(5) *The customary fee.* The Court has answered this question in its discussion of an appropriate hourly rate.

(6) *Whether the fee is fixed or contingent.* The *Johnson* court employs this variable as an aid to the Court "in demonstrating the attorney's fee expectations when he accepted the case." 488 F.2d at 718. Plaintiffs have asked the Court to view the fee as contingent and add 50 percent to a generous hourly rate by way of enhancement. The Court recognizes some merit in the argument of plaintiff's counsel that the $10,000 retainer fee (which, counsel inform the Court, was spent on expenses) should not alter the substantial contingent nature of the fee agreement in this case. A case in which an attorney is paid ten thousand dollars as a retainer is not entirely contingent, but in view of the hundreds of hours expended by plaintiffs' attorneys, the ten thousand dollars was clearly inadequate payment and the representation should invoke consideration similar to a contingent fee case. *Copeland v. Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc).

(7) *Time limitations imposed by the client or the circumstances.* The Court is not aware of any unusual time constraints in this matter.

(8) *The amount involved and the results obtained.* The Court is of the opinion that, considering the amount involved, no attorney could reasonably have believed that he would be entitled to a $300,000 fee in this case if his own client were paying the bill. The total amount of money received by all defendants from the strike fund was $140,000. Plaintiffs realized from the start that

defendants were entitled to a large part of this money for work they performed during the strike and for urgent expenses which were paid for them as for other union members. The maximum possible recovery for plaintiffs at the outset of the trial was in the area of $50,000.00.

Plaintiffs' attorneys might well have anticipated that they would expose mismanagement in the union, which would benefit the International, and serve as additional justification for the suit. The level of mismanagement, however, was directly related to the amount of funds misused by defendants. In this respect, plaintiffs should have been alerted that the amount of their attorney fees involving three attorneys with two of them from more than a thousand miles distance from the trial, was out of all proportion to the potential recovery.

Admittedly, plaintiffs had difficulty in marshalling the evidence to prove their case in large part because of the inadequate records and memories of defendants. Nevertheless, if the maximum possible recovery was somewhere in the area of $50,000, the actual results obtained, $14,461.30, were a good deal less.

If plaintiff succeeded on some of his claims, but failed to succeed on others, the time spent pursuing the unsuccessful claims is not compensable if the unsuccessful claims are not related to the successful ones. *Hensley*, 103 S.Ct. at 1940. On the issue of whether plaintiffs' claims were related, the Court will treat all claims as related. None of plaintiffs' time will be disallowed for unsuccessfully pursuing an unrelated claim.

(9) *The experience, reputation, and ability of the attorneys.* The quality of counsel's representation has already been noted in determining an appropriate hourly rate. This Court recognizes that plaintiffs were represented by able, dedicated attorneys.

(10) *The "undesirability" of the case.* The Court does not believe that counsel will suffer economic hardship resulting from their representation of plaintiffs in this matter, or that the case was "undesirable" except for the length of time from the filing of the suit to its conclusion and the travel involved for all of plaintiffs' attorneys.

(11) *The nature and length of the professional relationship with the client.* Plaintiffs' attorneys did not have a prior relationship with their clients.

(12) *Awards in similar cases.* Judgments in two similar cases have been roughly equivalent to plaintiffs' monetary judgment. In *Local No. 92 v. Norris,* 383 F.2d 735 (5th Cir. 1967), plaintiffs obtained a judgment of $22,896.01, and received attorneys' fees of $15,729.47. In *Highway Truck Drivers v. Cohen,* 220 F. Supp. 735 (E.D. Pa. 1963), plaintiff received a verdict of $24,921.44, and $38,000.00 in attorneys' fees.

The twelve factors listed above are not accorded equal weight in arriving at a reasonable fee. Under *Hensley,* "the most critical factor" used in evaluating the product of the attorneys' reasonable hours times a reasonable rate is the results obtained by plaintiff. 103 S.Ct. at 1941. In this case, the fee award has been primarily influenced by the fact that plaintiffs did not achieve a level of success that would make the hours reasonably expended a satisfactory basis for making the fee award. *Id.* at 1940. The Court in *Hensley* noted that where "plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where plaintiff's claims were interrelated, nonfrivolous, and raised in good faith." 103 S.Ct. at 1941.

For example, in *Earl v. Bealieu,* 620 F.2d 101 (5th Cir. 1980), a Truth-in-Lending Act case, plaintiff's recovery was $220, and plaintiff sought, $1,020 for plain-

tiff's attorney fees. The court in *Earl* limited the attorney fees to the amount of the recovery; i.e., $220. The court emphasized that the basis for so limited an award was "the amount involved and the results obtained." *Id.* at 103.

In cases such as this one, where the fee awarded exceeds the amount of the judgment, the Court believes that there should be a relationship between the two. In *Pearson v. Colonial Financial Services, Inc.*, 530 F. Supp. 599 (1982), a case brought before this Court, plaintiff sought attorneys' fees from the losing party which were fifteen times her recovery. Plaintiff received an award of attorney fees in excess of her judgment, but this award was for $6,000 in fees to plaintiff's attorneys rather than the $31,594.00 which had been sought. In rejecting most of plaintiff's claim for attorney fees, this Court made it clear that the primary reason was that the claimed fee was out of proportion to the amount in controversy and to the results obtained. *Id.* at 602.

In the present case, the union has made a strong argument based on legislative history that the union cannot be required to pay a fee in excess of the amount recovered. Judicial precedent deemed binding on this Court has held that the union can be required to pay in excess of the amount of the judgment. The Court notes, however that plaintiffs are seeking attorneys' fees and costs which are more than twenty times the amount of the judgment. These fees and costs are $290,000.00 greater than the monetary benefit to the union, in a case that was allegedly brought for its benefit.

In ruling on plaintiff's petition, this Court has tried to establish a correlation between the amount of the judgment and the amount awarded for attorneys' fees. If no such correlation is required, the fee to be awarded could become a devastating weapon with which to bludgeon settlements. 530 F. Supp. at 601. In a hypothetical case,

an attorney could demand that a union pursue a claim against a former officer of a defunct local union. The union may know that the former officer is insolvent. It may also know that it would cost far, far more to pursue the claim than the claim is worth. Nevertheless, the union must sue the former union officer over even trivial amounts. This could hardly have been the intent of Congress, nor would it be in the public interest.

After a review of the legislative history of LMRDA, this Court has found no indication that Congress, in allowing third parties to enforce the fiduciary obligations of union officials, intended that these parties should hold such a club to coerce decisions of a labor organization. The union should be allowed to exercise its own judgment regarding the merits of a suit without the fear of being forced to pay staggeringly large attorneys' fees which are not related to the expected recovery. In light of these considerations, the Court will order, by separate judgment, that defendants and the union are jointly liable for attorneys' fees to plaintiffs in the amount of $42,000.00.

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

Dec. 14, 1981

Appeal from the United States District Court
for the Middle District of Alabama

Before TUTTLE, HENDERSON and HATCHETT, Circuit Judges.

TUTTLE, Circuit Judge:

By this appeal we are required to construe and apply the provisions of the Landrum-Griffin Act, particularly 29 U.S.C. § 501(b) when persons alleging themselves to be members of a local union seek permission of a United States district court to file an action against former officers of the local alleging misappropriation of union funds, in which action the prospective plaintiffs seek to make a recovery for the benefit of the union.

This section provides:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b).

The petitioners, here the appellants, filed their petition with the district court seeking permission to file their suit as members of Local 7326 of the International Union, United Steel Workers, alleging that several former officers had, during a strike in which the petitioners had participated, embezzled and misappropriated money furnished to the Union by the International for strike benefits. The petition alleged that the petitioners were, at the time, members of Local 7326. They alleged sufficient facts which would have supported a complaint alleging misapplication of funds as outlined in § 501(b). They also

alleged that they had "made demand by letter to United Steel Workers of America [their international union] to take the necessary action to prevent any further union funds from being misused by defendants for the above-mentioned purposes, and to take immediate steps, by filing court action, to recover from the individual defendants the funds the defendants have wrongfully expended." They alleged the officers of the International had failed under a reasonable time to take such action. Based on such application, sworn to by the parties and presented to the court ex parte as is permitted under the statute, the trial court entered its order granting leave to file the petitioners' complaint.

Thereafter, after granting leave to the named respondents to delay the filing of their response, the trial court set down for a hearing a motion by United Steel Workers of America for permission to intervene for the purpose of moving the court to revoke its order permitting the filing of petitioners' complaint. This motion to intervene was supported by a long affidavit by the associate general counsel of the United Steel Workers of America, who outlined the usual procedures for the handling of the affairs of locals which are in similar circumstances to Local No. 7326. Neither the petition to intervene nor the Frankel affidavit categorically stated that the petitioners were no longer "members" of the union. This affidavit was extensively answered by counsel for petitioners prior to the hearing conducted by the trial court. The court did not enter an order allowing the intervention, but considered the pleading and affidavit as though it had done so.

The historical facts necessary for us to consider the correctness of the trial court's order revoking its original grant of permission to the petitioners to file their complaint are not in dispute. The membership of Local 7326 consisted entirely of production and maintenance employees employed by American Buildings Company in

Eufaula, Alabama. As of January 1, 1978 there were approximately 300 workers employed in the plant. There was a similar number of members of the Local in December of 1976, at the time of the expiration of the most recent collective bargaining agreement between the Local and the Company. Following the expiration of that agreement, USW commenced a strike against the Company over the terms of a proposed new agreement. The strike was authorized by a vote of the membership of Local 7326. It proved to be a long, bitterly contested struggle which was lost in the end of the Union. In support of the strike the AFL-CIO declared a boycott of the Company's products. The Local lost the right to represent the Company's employees following its defeat in a National Labor Relations Board decertification election conducted on May 18, 1978. This election became final by the Board's certification of the results of the election on July 14, 1978.

Local 7326 did not serve as collective bargaining representative for employees of any other employer than American Building Company. Thereupon, by letter dated July 14, 1978, the director of the district of USW in which Local 7326 was located requested that an administrator be appointed for Local 7326. This was apparently done under the provisions of Article IX of International's constitution which provides "in the event the International president shall have reason to believe any local union is failing to comply with any provision of the constitution, or that action may be required for one of the purposes specified in the following paragraph, the International president may, unilaterally or at the request of officers or members of the local union, institute proceedings . . . which may after appropriate hearings result in suspending or revoking the charter of any such local union." Included as one of the purposes mentioned above for which such action can be taken is "otherwise carrying out the legitimate objects of the International union or

such local." Presumably, in the opinion of the district director, such administrator was to be appointed because, in the language of the general counsel's affidavit: "This is the usual *first step* in a procedure followed in cases where locals have ceased to represent any employees." [Emphasis added.]

Following this appointment, the parties apparently agree that Local 7326 has been dormant; no dues have been paid and no meetings have been held. There apparently have been no collective bargaining or other union activities.[*]

The International contends that under these circumstances, the petitioners were no longer "members" of the Union. Petitioners, on the other hand, contend that until the charter has been revoked, the administrator has completed his audit and the funds have been properly disbursed, they are still members of the Local and of the International. They further contend that even if they were not technically "members" at the time the suit was filed, they nevertheless should be treated as "members-in-substance" and be permitted to file the complaint as members.

Although the petitioners, in their opposition to the trial court's reconsideration of its order granting permission to file the complaint, included a paragraph quoting from the Landrum-Griffin Act section under "definitions" dealing with "members," the trial court did not mention this definition in its disposition of the case. It held in effect, that the decertification brought about the dormancy of the Local which resulted in the loss of membership by all of its previous members, including the petitioners. It held that since they were not technically members they were not qualified under the statute to file such a complaint. The court bolstered its determi-

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[* The original opinion contained the following sentence at this point, which was stricken by subsequent order, see *infra* App. 52a: "Petitioners are still employees of American Buildings Company"].

nation of this issue by equating the status of a "member" under § 502 with that of a former stockholder in a derivate suit, citing in support of this theory, *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). This Court has held that a former stockholder is not qualified to bring an action on behalf of his corporation under Fed. R.Civ.Proc. 23.1. *Schilling v. Belcher*, 582 F.2d 995 (5th Cir. 1978), where we stated: "Only a shareholder, by virtue of this 'proprietary interest in the corporate enterprise,' " *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 321, 56 S.Ct. 466, 471, 80 L.Ed. 688 (1936), may " 'step into the corporation's shoes and . . . seek in its right the restitution he could not demand in his own.' "

The difficulty with this reasoning is that this statute makes a "member" of the union a statutory representative "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). It is thus not necessary that the petitioners in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members, the law says they have the standing to conduct litigation.

Moreover, it is appropriate when considering the meaning of the words in § 501(b) to look at the definition section of Chapter 11, of which this section is a part. This definition section is found at 29 U.S.C. § 402, in which it is stated:

> For the purposes of this chapter . . . ¶ O "member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the Constitution and bylaws of such organization.

The proof before the court at the time of the hearing was that these petitioners [*] had not voluntarily withdrawn from membership and they had not been expelled or suspended from membership. It is difficult to understand, therefore, how the International can contend that they were not "members" of the Local at the time the suit was filed. When it was creating a new right in "members" of a union, it was surely within the power of Congress to say "for the purposes of this Chapter we now say who is a member." This is the precise language of the statute.

The effect to be given to this definition has been ably described by the Court of Appeals for the Seventh Circuit:

> As is apparent from the choice of terms, Congress did not limit the protections of the Landrum-Griffin Act to those whom the union recognizes as members. Rather, one who has fulfilled the membership requirements, that is, one who is a member in substance, is protected. *Hughes v. Local 11, International Association of Bridge, Structural & Ornamental Ironworkers*, 287 F.2d 810, 814 (3d Cir.), *cert. denied*, 368 U.S. 829, 82 S.Ct. 51, 7 L.Ed.2d 32 (1961). There is little dispute that the laid-off employees satisfied the union's membership requirements. There is also little dispute that the laid-off employees were not members in good standing because they had not paid dues since their layoff. But under section 402(c), one who has met the membership requirements remains a member within the meaning of the Act until one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after "appropriate proceedings" held pursuant to

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[* The original opinion contained the following words at this point, which were stricken by subsequent order, see *infra* App. 52a: "were still employees, they"].

> lawful constitutional or bylaw provisions. *See Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213, 217 & n.6 (7th Cir. 1974). Neither of these events occurred here; the union simply classified the laid-off employees as being no longer in good standing. Since laid-off employees did not voluntarily withdraw and the union did not expel or suspend them, they are "members" and therefore protected by the equal rights guarantees of section 411, subject to the union's reasonable rules and regulations.

Alvey v. General Elec. Co., 622 F.2d 1279, 1284 (7th Cir. 1980).

We recognize that a particular union may have internal rules of membership, but these cannot limit the definition of "member" as contained in the statute that creates a cause of action by a "member." *See Hughes v. Local 11, etc.*, 287 F.2d 810, 817 (3d Cir. 1960). In any event, there is nothing in the constitution [1] of the International that is inconsistent with the definition of "member" in the statute. The assistant general counsel's affidavit, as quoted above, simply states that the administrator, William Caldwell, "took over the affairs of the local upon his appointment. This is the usual first step in the procedure followed in cases where locals have ceased to represent any employees." Article IX provides that when an administrator is appointed for a local union, he

> shall have the right to demand and receive in the name of the International union, and the local union officers shall have the obligation to turn over, the charter and all books, records, monies, assets and

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[1] Parts of the constitution were quoted in affidavits of the International. Petitioner moved this Court to supplement the record by receiving the entire constitution in evidence. This was not objected to by the International. We, therefore, grant that motion.

> property of the local union, *to be held in trust for the local union* and to be used and expended only in the proper conduct of *its* affairs. The administrator shall have the right to replace officers, grievants or other committee members or stewards removed by the International executive board or the administrator, by appointing temporary officers, grievants or other committee members or stewards. [Emphasis added.]

Thus, it is plain that the appointment of an administrator does not in and of itself terminate the Local. Since the Local cannot exist without members, it seems clear even under the constitution, that the persons who are in good standing upon the date of the appointment of the administrator continue to be members unless they are subsequently suspended or expelled or elect to "voluntarily withdraw."

The record is silent as to what activities the administrator engaged in during the 18 months between the time he took charge and the filing of the petition now before the Court. It is clear, however, that the charter had not been surrendered or canceled by the International, no proceedings had been started against any members looking towards their expulsion and none of them had voluntarily withdrawn from membership. The record discloses that there was some $2,000 in the treasury of the Local at the time the administrator was appointed and the record is not at all clear that pending the final winding up of the Local's affairs these funds belonged to the International as distinguished from the Local for whom, under the language quoted above, they were "to be held in trust . . . and to be used and expended only in the proper conduct of its affairs."

The International further claims, however, that an ingredient in the trial court's decision granting such a petition is that there must be a finding that there had been a showing of "good cause." The International contends

that the way it handled the matter instead of filing suit as outlined in the statute itself would have been more beneficial to the Union than to have acted as requested by the members. This, of course, cannot establish a want of good cause, because the language of the statute is clear and simple. The petitioners may act once they have notified the International and have requested that a suit be brought and there is a failure within a reasonable time to bring such suit. The trial court could not second guess the purpose of the statute by saying that some other precondition to the filing of a petition may take the place of the one laid down in the text of the section. The trial court found that this precondition had been satisfied.

In its motion to the trial court to vacate its original order, the International stated that one of its purposes was to "enable the Court to consider the matter of plaintiff's compliance with the jurisdictional prerequisites to this action and the question of 'good cause' under 29 U.S.C. § 501(b) on the basis of a full record." Upon the trial court's reconsideration, responding to such motion, the court did not withdraw or modify its earlier determination that the preconditions other than that of membership had been satisfied. It held only that the membership requirement had not been satisfied and made this the basis of its withdrawal of its earlier order.

Whatever may ordinarily be the requirement of the section as to the establishment of good cause, we are satisfied that it was adequately established in this case, once we have determined that these petitioners were members as contemplated by the Act. *See, e.g., Horner v. Ferron*, 362 F.2d 224 (9th Cir. 1966) and *Dinko v. Wall*, 531 F.2d 68 (2d Cir. 1976), which comments on *Horner v. Ferron* as the "most extensive treatment of good cause" to be found. Rather than accepting the standard of *Dinko* that the good cause requirement in § 501(b) means "that plaintiff must show a reasonable likelihood

of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence," we associate ourselves with the standard of the Court of Appeals for the Ninth Circuit as announced in *Horner, supra.* There, the Court said:

> Thus if the defendant can establish by undisputed affidavit, facts which demonstrate that the plaintiff is not a member of the defendant union, or that the action is outlawed by a statute of limitations, or that the action cannot succeed because of the application of the principles *res judicata* or collateral estoppel, or that plaintiff has not complied with some controlling condition precedent to the bringing of such a suit, then although these defects do not appear on the face of the complaint, they may warrant denial of the application.
>
> However, we think it inappropriate to consider, at such a hearing, defenses which require the resolution of complex questions of law going to the substance of the case. Defenses of this kind should be appraised only on motion for summary judgment or after a trial. Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope of summary judgment procedure, are *a fortiori*, beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed. Defenses involving disputed questions of fact should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pre-trial discovery as may be undertaken. [Footnotes omitted.]

362 F.2d at 229.

Under such a standard, we conclude that good cause was shown in this case.

Upon the filing of the motion by the law firm of Cooper, Mitch and Crawford, for a delay within which to plead to the original complaint, the petitioners filed

their motion "to disqualify the law firm of Cooper, Mitch and Crawford and any and all individual attorneys therein from providing legal service of any nature to the named defendants herein." The motion also sought an order "enjoining the United Steel Workers of America from engaging legal counsel or retaining legal counsel on behalf of the individual defendants herein." The grounds for the alleged disqualification were the assertions by the petitioners that the said law firm had represented the Local in proceedings before the National Labor Relations Board prior to the decertification order and that the International should be enjoined from otherwise providing counsel because of a conflict of interest, pursuant to the Labor Management Reporting and Disclosure Act of 1959. The trial court did not pass on these motions. They remain to be dealt with upon remand.

The trial court's order of June 30, 1980, 494 F.Supp. 732, withdrawing the leave to file a complaint previously granted on May 1, 1980 is REVERSED and the case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

March 19, 1982

On Petition for Rehearing, 663 F.2d 1048, and Suggestion for Rehearing En Banc; Truman M. Hobbs, Judge.

Before TUTTLE, HENDERSON, and HATCHETT, Circuit Judges.

PER CURIAM:

The statement contained in the opinions that "petitioners are still employees of American Building Company," appears not to be supported by the evidence in the record. It is therefore stricken from the opinion.

The Petition for Rehearing is DENIED.

No member of this panel or Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 25), the suggestion for Rehearing En Banc is DENIED.

APPENDIX F

UNITED STATES DISTRICT COURT
M.D. ALABAMA, N.D.

Civ. A. No. 80-180-N

ELBERT ERKINS, and SAMUEL DENSON,
and PERRY CULPEPPER,
Plaintiffs,

v.

BILLY BRYAN, and ARTHUR COMER, and
GEORGE BULLARD, and CHARLIE GREENE,
Defendants.

June 30, 1980

ORDER

HOBBS, District Judge.

This case illustrates again the pitfalls of *ex parte* orders; even in those circumstances where Congress by statute has expressly authorized such orders.

The plaintiffs in accordance with Section 501(b) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 501(b)) petitioned this Court for leave to file a complaint against certain officers of Local Union No. 7326 of United Steelworkers of America who allegedly took union funds and expended them for unauthorized and improper purposes including purchases for the personal benefit of said officers. Plaintiffs by this complaint seek to compel the officers of the local union to account for all expenditures made by them out of

union funds and to require the defendant union officials to reimburse Local 7326 and USW for all improper expenditures of union funds made or authorized by them.[1]

Section 501(b) provides as follows:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such

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[1] USW was granted the right to be heard on its plea for reconsideration of the *ex parte* order of this Court in granting plaintiffs the right to file their complaint for the benefit of USW against officers of Local Union No. 7326. Plaintiffs challenge the right of USW to "intervene" in this proceeding by way of urging such reconsideration, because Rule 24(c) requires that a motion "to intervene be accompanied by a pleading setting forth the claim or defense for which the intervention is sought." Plaintiffs correctly argue that USW has no intention of filing a pleading setting forth a claim or defense. But USW has filed a Motion to Vacate Leave to File a Complaint with accompanying memorandum and affidavits. The Federal Rules of Civil Procedure were not written with the almost unique situation in mind in which a plaintiff must obtain permission of court in order to file a complaint. In the instant proceeding, USW does not desire to join issue on the complaint. It simply desires to question the jurisdiction of this Court under § 501(b) of Title 29 to allow this suit to be brought by these plaintiffs for the benefit of USW.

Although the Court is of the opinion that USW has a right to ask for such reconsideration, if the plaintiffs lack standing to bring this suit, the Court could and should on its own motion, re-examine a ruling where the Court has the independent obligation under § 501(b) to determine prior to the commencement of the suit whether the conditions precedent to bringing the suit have been met. This Court, therefore, does consider the oral arguments advanced by the plaintiffs and counsel for USW as well as the memoranda and affidavits filed by them in determining whether its original order was proper.

> member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

The purpose of allowing suit by union members is "to further union democracy and thereby prevent misuse of power of union leaders." *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). The suit is for the benefit of the union, not its individual members or the named plaintiffs. As is clear from its reading, § 501(b) imposed certain conditions precedent to suit.

First, a demand must be made on the union to bring an action to recover the allegedly misappropriated funds. Plaintiffs made such a demand.

Second, the labor organization must refuse or fail to sue to recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so. The union in this case has failed to sue although it was provided with a letter in mid-December, 1979, requesting an accounting and alleging misappropriation of union funds by officers of Local Union No. 7326. A representative of USW responded to this letter by requesting the basis for the charges against officials of the Local union. In February 1980, plaintiffs sent an affidavit to USW which contained information

suggesting that union funds were misappropriated by local officials. A series of letters were exchanged between the attorney for the plaintiffs and a representative of USW. On March 6, 1980, the representative of USW wrote the plaintiffs' attorney stating that USW had determined to turn the matter over to the United States Department of Labor for investigation of the charges against the Local officers.

USW contends that its action in turning this matter over to the Department of Labor was reasonable and in no way manifests a decision on its part not to pursue the alleged wrongdoers. Although USW's election may be logical and in the best interest of the union, it does not obviate the fact that the union has refused to bring suit after a demand of several months standing. This Court, therefore, finds that the second condition precedent to suit has been met.

The third condition precedent to bringing suit is that the plaintiff be a "member" of the union. The complaint alleges that plaintiffs "were at all times material hereto members in good standing" of Local 7326 of USW. Without question, plaintiffs were members of the union for purposes of § 501(b) during the time of the alleged misappropriation of funds. The USW points out, however, that plaintiffs are not now, and were not at the time suit was filed, members of the union.

Local 7236 went on strike against the only employer employing any of its members in December, 1976. The strike was long and bitter, ending in failure in May, 1978. Thereafter, USW lost the right to represent the company's employees following its defeat in a National Labor Relations Board decertification election conducted in May, 1978. The Board overruled USW objections to the decertification election on July 14, 1978.

Following the loss of the election, Local 7326 had no bargaining representative status, and in July, 1978, an

administrator was appointed to conclude the affairs of Local 7326. The Local was dormant for some eighteen months or more prior to the filing of the instant suit. No dues have been received nor have any meetings been held. In short, no activities of any kind have occurred since at least October, 1978, in connection with USW Local 7326.

During the strike, USW placed money in a special strike fund for the use of Local 7326 to cover expenses of the strike and to aid members through the economic hardship of the strike. The Local was responsible for the distribution of these funds, and it is with respect to these funds that plaintiffs charge misappropriation by officers of Local 7326. Pursuant to agreement between USW and its locals, any funds remaining in local strike funds after conclusion of strikes are returned to USW.

All dues paid by members of the USW are the property of USW rather than the local, and in the event of the revocation of a local union's charter or if a local union disbands, all assets of the local are returned to USW. Article IX, Sec. 4, of USW Constitution.

Finally, Article XI, Section 7 of the USW Constitution, provides:

> A member whose membership is terminated shall have no right or interest in any property of the Local Union or of the International Union, including any dues, assessments or other financial obligations paid by such member in advance of the effective date of such termination.

Plaintiffs concede that since they are no longer union members they have no derivative interest in any recovery effected by them on behalf of the union. They insist, however, that they have an interest in righting a wrong which the local union officers inflicted on them and other members of Local 7326. Plaintiffs argue that USW has no interest in stopping wrongdoing of local union officers

and that its action from the time of plaintiffs' original demand for an investigation to the present has been protective of the local officers. Plaintiffs argue that unless they are allowed to prosecute this action, any effort by USW will be feeble at best and will strangle in bureaucratic inertia and dilatory "buck-passing." Hopefully, USW will recognize its interest in pursuing wrongdoing where it occurs on the part of Local officers. The interest of USW in taking strong action to halt the misappropriation of funds provided by it to strikebound Locals would seem obvious.

This Court, however, recognizes the possibility that USW may be less than vigorous in pursuing this matter. However, the issue remains as to whether plaintiffs meet the third condition precedent to suit under 29 U.S.C. § 501(b); i.e., that they be Union members. This Court on re-consideration holds that they do not, and therefore, withdraws its leave to file this action granted herein on May 1, 1980.

Plaintiffs rely on *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968) in support of the proposition that they meet the requirement of union membership imposed by the statute. In *Phillips, supra*, the erstwhile plaintiff was a union member at the time he brought suit according to the Constitution and By-Laws of the Union. The court nevertheless held that he could not bring the suit because he had also joined a rival labor organization and his interest at the time he filed suit was actually antagonistic to the union for which he sought to bring the action, and for purposes of § 501(b), he was not an appropriate person to bring an action for the benefit of the Union.

Plaintiffs' attorney points out that no such antagonistic interest prevails with the instant plaintiffs. They are not members of a rival union. But unlike the plaintiff who was disqualified in *Phillips*, the instant plaintiffs were not members of USW when suit was filed.

In *Phillips, supra,* the court pointed out that § 501(b) gives the union members a right akin to the right of shareholders in a shareholder derivative suit. The Court stated:

> The condition of membership, which is expressly required by the Section, seeks to insure that a representative of the union, the real party in interest, will properly represent the union's interests in the litigation. *Phillips, supra,* at 832.

The plaintiffs in the instant suit, therefore, may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivative suit after he has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. 7A C. Wright & A. Miller, *Federal Practice and Procedure,* 325 (1972); 19 Am.Jur. 2d, *Corporations,* § 559. A complete victory in this case by the plaintiffs will be of no tangible benefit to the plaintiffs since they are not members, and a recovery for the USW will not be to their benefit, derivatively or otherwise. Conversely, a loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise.

In *Schilling v. Belcher,* 582 F.2d 995, (5th Cir. 1978), the court considered the standing of a former stockholder to bring an action on behalf of the corporation. At page 999, the *Schilling* court stated:

> Fed.R.Civ.P. 23.1 contains two discrete standing requirements: (1) the plaintiff must have owned stock in the defendant corporation at the time of the transaction of which he complains, the so-called "contemporaneous ownership" requirement, and (2) the plaintiff must be a shareholder of the defendant cor-

poration at the time suit is brought. The latter requirement, unlike the contemporaneous ownership rule, is not expressly stated in the rule, but rather is implied by the statement that an action under Rule 23.1 may be "brought by one or more shareholders . . . to enforce a right of a corporation." Only a shareholder, by virtue of his "proprietary interest in the corporate enterprise," *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 321 56 S.Ct. 466, 471, 80 L.Ed. 688 (1936), may "step into the corporation's shoes and . . . seek in its right the restitution he could not demand in his own." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). Thus, it is generally held that the ownership requirement continues throughout the life of the suit and that the action will abate if the plaintiff ceases to be a shareholder before the litigation ends. C. Wright & A. Miller, 7A Federal Practice and Procedure § 1826, at 325 (1972); see *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976); *Niesz v. Gorsuch*, 295 F.2d 909 (9th Cir. 1961); 3B Moore's Federal Practice ¶ 23.1.17, at 23.1-63 (2d ed. 1978); see also Annot., 168 A.L.R. 906 (1947).

The *Schilling* court also quoted from *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735-736 (3rd Cir. 1970) as follows:

> Standing [to bring a derivative action in behalf of a corporation] is justified only by [the] proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest.

Plaintiffs also rely on *Axelrod v. Stoltz*, 264 F.Supp. 536 (E.D.Pa. 1967). In *Alexrod, supra*, the party seeking to bring the suit was suspended from union mem-

bership, and the union contended that it had to take formal action to reinstate the party before he was a "member" within the meaning of § 501(b). The court in *Alexrod* held that Axelrod became a "member" of the union when his period of suspension expired even though the union had not taken any affirmative action to reinstate.

As the *Axelrod* court stated:

> When Axelrod's period of suspension ended, there was no requirement for any proceedings looking to reinstatement. When he tendered dues after the expiration of the suspension period, he had done all that was necessary to the restoration of his benefits and privileges as a union member. The rejection of the tender of dues was improper. *Axelrod v. Stoltz, supra*, at 540.

Thus, the *Axelrod* court recognized the requirement of § 501(b) that in order to maintain the action the plaintiff had to be a member of the union, and it expressly found such membership existed.

Plaintiffs argue that their lack of union membership is through no fault of theirs, but results from the fact that their local union ceased to function. This is obviously true, but this does not give them the standing of "membership" which is required to bring this action. To paraphrase the language of *Schilling, supra*, at p. 1002, "a close reading" of § 501(b) persuades us that Congress "has not chosen to entrust the heavy responsibility of vindicating unenforced" union "rights to a representative who is no longer a member of the class which will benefit or suffer from his actions." Accordingly, it is

ORDERED that leave to file the complaint herein granted on May 1, 1980, be, and is hereby, WITHDRAWN.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Civil Action No. 80-180-N

ELBERT ERKINS and SAMUEL DENSON,
and PERRY CULPEPPER,
Plaintiffs

vs.

BILLY BRYAN, and ARTHUR COMER, and
GEORGE BULLARD, and CHARLIE GREENE,
Defendants

[Filed July 21, 1980]

ORDER

This cause is before the Court on plaintiffs' motion for reconsideration filed herein on July 14, 1980. In their motion plaintiffs now state that they do not concede that they were not members of Local 7326 when the complaint was filed. Plaintiffs argue that because the closing audit has not occurred under administratorship, the local union has not been dissolved. Based on this fact, plaintiffs now make the assertion that they are still members of the union for the purpose of construing 29 U.S.C. § 501(b).

The argument presented to this Court orally by plaintiffs' counsel on June 20, 1980, and the documents on

file in this cause simply do not support plaintiffs' present assertion of present membership in the local union.

From the argument reported stenographically and transcribed in part at the Court's request, plaintiffs' counsel again and again acknowledged that plaintiffs were not mebers of the union at the time the complaint was filed. Counsel contended that Title 29, § 501(b) was met if plaintiffs were loyal union members at the time the union was decertified. For example:

> MR. JACOBSON: If Your Honor please, as I recall, when we met in the Court's chambers, I recall distinctly indicating to the Court, and the complaint so indicates, that Mr. Erkins and Mr. Denson and Mr. Culpepper were members of the union at the relevant—what we allege is the relevant period of time, which was up to the time the union was decertified, and that we did indicate to the Court that the union local was no longer in existence, because the strike had been lost and that the local had been decertified, and I do apologize to the Court if I gave the Court the impression they were members at the time of the complaint.

And later:

> MR. JACOBSON: Now, on the issue of membership, which bothers the Court, because clearly they were not members at the time. . .

And later:

> MR. JACOBSON: A common sense reading of what membership has got to mean in this situation, it's got to mean that as far as the strike which ends up in decertification. It is the members in good standing during the strike up to the point of decertification, and none of these plaintiffs, Your Honor, crossed that picket line.

Thus, plaintiffs' counsel conceded that plaintiffs were not union mmebers when suit was filed and argued forcefully that this fact was irrelevant in light of the plaintiffs' undisputed membership when the alleged improprieties occurred.

As stated in this Court's order entered herein on June 30, 1980, vacating leave to file suit granted on May 1, 1980:

> Following the loss of the election, Local 7326 had no bargaining representative status, and in July, 1978, an administrator was appointed to conclude the affairs of Local 7326. The Local was dormant for some eighteen months or more prior to the filing of the instant suit. No dues have been received nor have any meetings been held. In short, no activities of any kind have occurred since at least October, 1978, in connection with USW Local 7326.

The union is in a caretaker status until it is accounted for and dissolved, but the fact that this process has not concluded is insufficient to support plaintiffs' newly-found assertion of present union membership nor does that fact have any effect on this Court's determination that plaintiffs lack standing to sue under 29 U.S.C. § 501(b).

Plaintiffs' counsel argued vigorously at the hearing that these plaintiffs were not to blame because they were no longer union members. Plaintiff's counsel insisted that plaintiffs had been loyal members throughout the strike and were loyal members when the alleged wrongs took place. These facts are not in dispute, but they do not give "standing."

The basis for the Court's withdrawal of its right to file the complaint was based upon the plaintiffs' lack of any derivative interest in the outcome of the lawsuit. Any derivative interest these plaintiffs might have had in the outcome of this lawsuit was extinguished on the

decertification of the union and the absence of any activity by the union or by these plaintiffs as union members for eighteen months prior to the filing of this suit. The outcome of plaintiffs' claim in this suit would in no way benefit plaintiffs, whether the process of liquidating the union has been concluded or not. The mere fact that this defunct union has not been liquidated cannot give these plaintiffs a derivative interest in the outcome of the lawsuit. In the opinion of this Court, these plaintiffs are not proper representatives to bring a suit for the benefit of the union. Membership in the union is a clear requirement by Congress when it bestowed the right of action in 29 U.S.C. § 501(b).

Accordingly, it is ORDERED that plaintiff's motion for reconsideration be, and it is hereby, denied.

DONE this 21st day of July, 1980.

/s/ Truman Hobbs
United States District Judge

APPENDIX H

STATUTORY PROVISIONS INVOLVED

Sections 3(o) and 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 402(o), 501(b), provide in pertinent part as follows:

§ 3. *Definitions*

For the purposes of this chapter—

(o) 'Member' or 'member in good standing,' when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

§ 501. *Fiduciary responsibility of officers of labor organizations*

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall

be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.